LIM NYUN YIN v. GAN KIM BIOW & ORS.

[O.C.J. (Wong Kim Fatt J.C.) December 30, 1981; February 20 & 26, 1982]
[Seremban — Divorce Petition No. 20 of 1980]

Family law — Divorce — Adultery — Desertion — Cruelty — Standard of proof.

The petitioner, a Singapore staff nurse, and the respondent, a Malaysian dental surgeon, were married in 1977 in the civil marriage registry in Seremban. After their marriage and honeymoon, they were supposed to set up matrimonial home in Bahau, Negeri Sembilan. As events turned out, they never really set up any proper matrimonial home in Malaysia or Singapore. She continued to work as a staff nurse in Singapore and he a dental surgeon in Negeri Sembilan and they met and had marital intercourse on weekends and holidays on both sides of the Johore Causeway. This arrangement appeared workable till the respondent was transferred to the Government dental clinic in Seremban, when the petitioner became suspicious of his relationship with two staff nurses, the co-respondents.

After signing a separation agreement, the couple decided to live apart. The petitioner then filed her petition seeking dissolution of the marriage based on the sole ground of the respondent's adultery with the co-respondents. The evidence in support was not direct but circumstantial. In his answer, the respondent counter-charged desertion and cruelty on the petitioner's part and sought divorce on those grounds.

Held: (1) adultery, cruelty, and desertion are serious matrimonial offences and require proof beyond reasonable doubt;

(2) on the facts, the petitioner failed to satisfy the court beyond reasonable doubt or on the balance of probabilities that adultery had been committed. At its very best, the case of the petitioner is consistent with both the guilt and innocence of the respondent and 1st co-respondent, in which event adultery must be held to be not proved;

(3) on the facts the respondent had failed to prove desertion and cruelty;

(4) the petition of the petitioner and relief sought by the respondent in his answer are both dismissed, with no order as to costs against each other. The petitioner must, however, pay the costs of the 1st co-respondent and proper disbursements of the 2nd co-respondent, to be taxed.

Cases referred to:-

(1) *Blyth* v. *Blyth* [1966] 1 All E.R. 524.
(2) *Bastable* v. *Bastable* [1968] 3 All E.R. 701.
(3) *Ng* v. *Lim* [1969] 1 M.L.J. 139.
(4) *Koh Teng Lam* v. *Elsie Koh* [1976] 1 M.L.J. 103.
(5) *Shanmugam* v. *Pitchamany* [1976] 2 M.L.J. 222.
(6) *Russell* v. *Russell* [1897] A.C. 395.
(7) *Gollins* v. *Gollins* [1964] A.C. 644.

DIVORCE PETITION.

Miss Victoria Ng for the petitioner.

H.N. Lim for the respondent.

K.L. Chong for the 1st co-respondent.

2nd co-respondent in person.

Cur. Adv. Vult.

Wong Kim Fatt J.C.: Three nurses and a dental surgeon are involved in this petition for divorce. The petitioner, Lim Nyun Yin ("wife"), 29, a medical staff nurse from Singapore, is seeking dissolution (with ancillary relief) of her 4½-year-old marriage with her husband the respondent, Dr. Gan Kim Biow ("husband"), 32, a dental surgeon now in private practice, on the sole ground of his adultery with the 1st co-respondent, Lee Ai Lin ("Ai Lin"), 27, a medical staff nurse, and the 2nd co-respondent, Lim Yih Ching ("Yih Ching"), 26, a dental staff nurse. There are no children born of the marriage. The petition was filed under the Divorce Ordinance, 1952, which will be repealed by the long-awaited Law Reform (Marriage and Divorce) Act, 1976, when it comes into force in about two days on March 1, 1982.

The wife and the husband first met in 1966 in the small town of Batu Kikir, near Kuala Pilah, Negeri Sembilan, during their school days. That first fateful meeting eventually blossomed into marriage some eleven years later, when the young couple finally decided to take the plunge. The wife, then a spinster, and the husband, then a bachelor, were married in the civil marriage registry in Seremban on August 2, 1977. On their wedding night, the newly-married couple gave a wedding dinner to their close friends and they then went on their honeymoon.

It appeared that after the marriage and honeymoon they were supposed to set up their matrimonial home at premises No. 77A, Batu Bakar, Bahau, Negeri Sembilan. The premises had four bedrooms, the first of which was for their occupation. The husband's parents, two sisters and four brothers also lived at the same premises, which appeared to lack privacy and amenities for the newly-married couple to live together as husband and wife. That must have been one important reason why the wife was never keen to live there.

The evidence of the wife's mother and the husband's mother shows that the couple never really set up a proper matrimonial home in Malaysia or Singapore. After the marriage, they met each other as husband and wife and had marital intercourse in Singapore, Seremban, or Bahau, over weekends or holidays, but these meetings could not be described as very frequent by any standard.

The husband at that time was in the Government dental service, earning about $895 per month, a salary too small to support comfortably the couple and the husband's own family. Thus from the financial point of view, there was a genuine need for the wife to continue working as a staff nurse in Singapore.

The wife, being a Singaporean, wanted the husband to work in Singapore and he, being a Malaysian, wanted her to work in Malaysia. Both their respective wishes did not materialize mainly because of professional qualification and citizenship problems of one spouse in the other country. So they had to continue working and meeting each other on both sides of the Johore causeway as before. Those may be said to be the happy days of the marriage.

This arrangement appeared workable until the husband was transferred in March 1978 from Kuala Pilah to the Dental Clinic of the General Hospital, Seremban. He eventually set up his private practice in September 1979. The wife began to become suspicious of the activities of the husband, whom she described as a passionate man. These activities, centred around the relationships of the husband with the two co-respondents Ai Lin and Yih Ching in Seremban

and Bahau respectively, were threatening to rock the foundation of their fragile marriage. Before they had time to solve the teething problems of their hitherto not well tested marriage, events took place swiftly not for its good.

By paragraph 8 of her amended divorce petition dated March 6, 1981, the wife alleged that "between November 1977 and January 1979 at the Doctors' Quarters, Seremban General Hospital, Seremban, the respondent had lived, cohabited and habitually committed adultery with the 1st co-respondent, Lee Ai Lin (f) who is a staff nurse at General Hospital, Melaka. On January 2, 1979 at 12.30 p.m. in the said premises, the said Lee Ai Lin *confessed* to the petitioner and petitioner's mother tnat she had lived with the respondent for about one year and at that material time she was pregnant by the respondent. She further confessed that she had undergone a previous abortion in November 1978."

By paragraph 10 of the amended petition, the wife also alleged that "further between the period of October 1979 and April 1980, at the premises of Gan Dental Clinic, No. 7, Lorong Satu, Taman Acbe, Jalan Kuala Pilah, Bahau, Negeri Sembilan, the respondent has also lived, cohabited and committed adultery with the 2nd co-respondent, Lim Yih Ching (f) who is a dental staff nurse in Bahau Government Dental Clinic."

The husband in his answer prayed for dismissal of the wife's petition and counter-charged her with desertion and cruelty. He asked for dissolution of their marriage on those grounds.

Let me now deal with the question of adultery. The burden of proving adultery is on the wife, there being a presumption of innocence on the part of the husband and the two co-respondents. What is the standard of proof required in this case where there is an allegation of adultery? Under our law, adultery is not a criminal offence, but it is certainly a serious matrimonial offence. Learned counsel for the wife, the husband, and Ai Lin (Yih Ching unrepresented by counsel) all agreed in their written submissions that adultery must be proved to the satisfaction of the court beyond reasonable doubt. For authorities in support of this proposition, I need only without quoting any passages refer to *Blyth* v. *Blyth,*[1] *Bastable* v. *Bastable,*[2] *Ng* v. *Lim,*[3] *Koh Teng Lam* v. *Elsie Koh*[4] and *Shanmugam* v. *Pitchamany.*[5] I regard adultery, cruelty and desertion as serious matrimonial offences requiring in principle a high standard of proof. This means proof to the satisfaction of the court beyond reasonable doubt, that is to say on a standard of proof higher than that of proof on a balance of probabilities which I equate with proof on a preponderance of probabilities.

Now what is the evidence adduced by the wife to prove that her husband had committed adultery with Ai Lin and Yih Ching?

It will be convenient to deal first with the case of Yih Ching as it is comparatively less complicated. The wife said in evidence that, while her husband was working in his private dental clinic in Bahau in September 1979, she went to its back portion and saw ladies' brassiers and underwears hung outside for drying. The wife said his sister told her these did not belong to her. His sister was not called by her to give evidence. For information, the wife then approached her ex-classmate, one Mr. Cha Choon Hey (PW3), a sales executive occupying a portion of the husband's premises.

Cha said the husband had been going out with Yih Ching. The husband's dental clinic was on the first floor of a three-storey shophouse. There were two rooms in the front portion of the clinic. The right room was the dental surgery room. The left room was partitioned into two portions, one of which was used by the husband as his rest room, while the other was used by Cha, who had seen Yih Ching very often in the clinic, sometimes helping the husband to make dental gauzes. Cha also saw them having supper together. Then on one unspecified Sunday afternoon, Cha saw the husband and Yih Ching sitting close together watching a television show in the hall of the clinic. However, Cha was uncertain if there were nurses at the back portion of the clinic. Under cross-examination, Cha admitted that there were two nurses staying at the back portion of the premises. The nurses and others had access to the hall where the husband and Yih Ching were watching the television show. That was all the evidence produced by the wife to prove adultery.

In my judgment to prove adultery it is insufficient merely for the wife to prove that the husband and Yih Ching were in close proximity or sitting close to each other watching a television show. The husband and Yih Ching had denied that they committed adultery. The hall was accessible to others and further two nurses were staying at the back portion of the clinic. Although the husband and Yih Ching may be described as good friends, the opportunity, if any, available to them that Sunday was certainly not conducive to any act of sexual intimacy in the hall. Granted that they were sitting close to each other, and they could even be holding hands under suspicious circumstances, but suspicion is no proof of adultery. The ladies' undergarments said to be seen by the wife probably belonged to the two resident nurses. There is no evidence that Yih Ching had lived and cohabited between the period October 1979 to April 1980 at the clinic premises. I must say that the evidence adduced falls far short of that required to prove adultery even on a balance of probabilities, let alone on proof beyond reasonable doubt. In the circumstances, the petition on the ground that the husband and Yih Ching committed adultery must fail. I find that the husband and Yih Ching were not guilty of adultery.

In the case of the co-respondent Ai Lin, the wife gave evidence that she saw her on two occasions in the husband's room in the doctors' quarters in the General Hospital in Seremban. The first occasion was in November 1978 when the wife said she opened the room of her husband with her key and saw Ai Lin in ordinary dress lying on his bed. She went out of the room to telephone her husband unsuccessfully. She then went back to the room and found Ai Lin had awaken and changed into transparent striped pyja-

mas. Ai Lin was so shocked to see her and exclaimed, "Ah, you're back!". The wife was very angry and went straight to find her husband in the Government Dental Clinic, Seremban, where, she said, his face turned pale when he saw her. The wife said that she and Ai Lin both cried and the two ladies then went out for lunch together, presumably for a tete-a-tete, although what precisely transpired during this unusual lunch is not clear from the evidence, other than what the wife said that Ai Lin had told her that the husband had said he wanted to divorce the wife, who refused to do so unless she was dead.

On the second occasion on January 2, 1979, the wife and her mother (PW2) saw Ai Lin in the same room with the husband. Both the husband and Ai Lin did not deny the fact that Ai Lin was in his room. But there were conflicting accounts of what had happened.

According to the wife, her husband had known in advance that she and her mother were going to visit him in his quarters. She found Ai Lin and the husband in his room. Her mother suggested that he and Ai Lin should go out for lunch and, while they were out at lunch, the wife and her mother found in his room brassiers, ladies' underwears and pyjamas not belonging to the wife. When the husband and Ai Lin had returned from lunch, the wife's mother queried the relationship between him and Ai Lin. The mother told her that the wife and the husband were married and Ai Lin should leave him. Ai Lin replied in the negative and said it was too late and that she was pregnant. The wife challenged Ai Lin to a urine test for pregnancy but she did not show her any test results. The wife said that Ai Lin said she had been living with the husband for one year in his quarters and that she had undergone a previous abortion, and that the husband had admitted that her aborted baby was his. Thus the wife had sought to prove adultery by what she saw that day and by the alleged oral confessions of the husband and Ai Lin.

The wife called her mother to corroborate her evidence. The mother said when they arrived at the quarters, she saw Ai Lin in his room. The mother said that the husband told her that Ai Lin came to have a rest in his room. The mother then asked the husband and Ai Lin to go out for lunch. While they were out, the mother found woman's underwears, brassiers, pyjamas and dresses hung side by side with the clothings of her husband. The mother said that Ai Lin said it was too late for her to leave the husband and that she was pregnant. On being cross-examined, the mother said she assumed that the woman's undergarments belonged to Ai Lin, who spoke to her in Mandarin, but Ai Lin did not tell her she was pregnant by the husband. Neither did he tell her about this. The mother also stated that Ai Lin also said the aborted baby belonged to her and the husband. The mother further said the husband was waiting for her and the wife, but he did not tell the mother there was a woman in his room.

The husband's version is that he met Ai Lin in February 1977 before he married his wife. He and Ai Lin had become good friends. She was his patient in the Kuala Pilah Government Dental Clinic. After he was transferred to Seremban, she came to see him on a follow-up treatment of a dental crown on January 2, 1979, when he gave her a local anaesthesia. She did not feel well after that and he offered his room in the doctors' quarters for her to rest since they were good friends. He accompanied her to his quarters about 10 minutes walk from his clinic. About noon that day, the husband was surprised that his wife had come to see him in the clinic. They went to his room and found her mother and Ai Lin there. The three ladies had a quarrel and he denied the charge of adultery with Ai Lin, who also denied it. He said there were no personal effects of Ai Lin in his room, and that was the first and only time Ai Lin had ever visited his room. After that incident, Ai Lin did not visit him any more since she knew he was married.

Ai Lin in her evidence said that she was married and was expecting her first baby. This was her first pregnancy and she had not undergone any abortion before. She corroborated the evidence of the husband regarding her follow-up treatment of her dental crown. On feeling unwell after the treatment, she accepted the offer of the husband to rest in his room, where she remained for about half an hour when she heard someone knocking on the door. On opening the door, she saw the wife and her mother. The wife rushed out with her mother, and Ai Lin did not know what had gone wrong. Half an hour later, the husband returned to the room with the wife and her mother. Ai Lin denied saying she had a previous abortion. Neither did she say she was carrying the husband's baby. She did not have her personal effects in his room, and she did not notice any ladies' underwears there. She said that was the only time she went to the husband's room and she never had lunch with the wife.

All the parties concerned did not dispute that on January 2, 1979, Ai Lin was found in the husband's room. I am not concerned with the ethics of the doctor-patient relationship as it is not an issue before the court. According to the evidence of the wife and her mother, the husband had known they were coming to visit him that day and he had been expecting them. If this version were true, it sounds incredible that the husband should want to keep Ai Lin in his room knowing full well that his wife and mother-in-law were coming. Although the wife had a key to his room, it is not clear from the evidence why she must knock at his room door this time since her apparent objective was to find tell-tale evidence of adultery against her husband. There is no evidence to show or support an inference that he was keen to have a divorce based on his adultery with Ai Lin, whose alleged oral confession of cohabitation with him for a year, of previous abortion of his baby, and of her pregnancy had not been corroborated in any way by any independent credible oral or documentary evidence. Ai Lin was unmarried at that time and a quick divorce for her on ground of adultery did not arise. She was not seeking forgiveness and neither had she anything to gain by her voluntary or spontaneous confessions. Although it is very rare that a respondent and co-respondent were caught in the very act of adultery itself, the petitioner must prove the opportunity for the parties to commit adultery and further their disposition to do so, in order that in appropriate

circumstances the court may conclude by necessary inference that adultery was or must have been committed. A mere opportunity by itself is insufficient as it might or might not be be used, unless it was such an opportunity that on the facts an inference of adultery is irresistible. The court should be most reluctant to stretch its own imagination to draw an inference of adultery.

After this incident, the wife and the husband agreed to live apart, and on January 31, 1979, they executed a separation agreement before an advocate and solicitor in Bahau. Since then, relationship between the wife and the husband took a turn for the worse. It was stated in the husband's answer that the wife's father sued the husband to recover a sum of $800 on a dishonoured cheque for lack of funds issued by the husband to his father-in-law.

Let me now go back to the first incident alleged by the wife to have occurred in November 1978. The exact day of this incident was not pleaded in the amended petition. She could not also remember this important date in her oral evidence. Although very angry that Ai Lin was found in the husband's room, she still found time and mood to have lunch with Ai Lin, who denied the incident. There is no evidence to corroborate the evidence of the wife on this incident. There is also no evidence on what she did to demonstrate her disapproval and non-condonation after the alleged incident, unlike that on January 2, 1979, which was swiftly followed by the execution of the separation agreement at the end of that very month. On the balance of probabilities, I find as a fact that the incident in November 1978 did not take place.

I am thus left in a state of reasonable doubt as to the case of the wife. I am not satisfied beyond reasonable doubt that she had proved adultery. Even applying a lower standard of proof, that is proof on a balance or preponderance of probabilities, I am still of the view that the version of the husband and Ai Lin is the more probable and truthful one. At its very best, the evidence adduced by the wife is consistent with both the guilt and the innocence of the husband and Ai Lin, in which event, in fairness to them, the case of the wife must be held to be not proved. I therefore find that the wife had failed to prove that her husband committed adultery with Ai Lin.

I now come to the relief sought by the husband in his answer. The burden is on him to prove desertion and cruelty beyond reasonable doubt. Let me examine his evidence in support of his allegations of desertion and cruelty. Although after the marriage, the wife did not live with the husband in the matrimonial home at No. 77A, Batu Bakar, Bahau, there is evidence they met and slept together as husband and wife. In her letter of March 1, 1978, she addressed him in the most endearing term of "Dear Darling", signing off with an equally affectionate "Yours". They subsequently agreed to live apart as evidenced by the separation agreement of January 31, 1979, after which the period for desertion would cease to run. His idea of cruelty was that his wife denied him conjugal rights when she came to see him in Seremban. This allegation is hardly credible as he never challenged what she said in evidence that she had marital intercourse with him in Seremban and in Bahau. The husband frankly admitted he did nothing to apply to court for restitution of his conjugal rights. In any event, there is no evidence whatsoever that his mental or physical health had suffered in any way or there was a reasonable apprehension that injury to health would result from the alleged cruelty on the part of his wife. (See *Russell* v. *Russell*[6] and *Gollins* v. *Gollins*[7]). Even on a balance of probabilities, let alone proof beyond reasonable doubt, the husband had failed to prove desertion and cruelty.

I may observe that throughout the entire two-day hearing in these proceedings, not a single strand of evidence was given on any steps taken either by the wife or the husband to effect a reconciliation between them at any time right up to the second and final day of hearing concluded last Saturday.

In the result, the petition of the petitioner and the relief sought in the answer of the respondent are both dismissed, with no order as to costs against each other. The petitioner, however, must pay the costs of the 1st co-respondent and the proper disbursements and expenses of the 2nd co-respondent to be taxed by the proper officer of the court.

Petition dismissed.

Solicitors: *Ng, Tan & Kwang; Ismail Yassin & Lim; Koh Kim Leng & Co.*

MAT JUSOH BIN DAUD v. SYARIKAT JAYA SEBERANG TAKIR SDN. BHD.

[O.C.J. (Salleh Abas F.J.) January 19 & March 15, 1982]
[Kuala Trengganu — Civil Suit No. 78 of 1978]

Employment — Injury in course of employment — Whether worker employee of defendants or employee of contractor — Whether person is part and parcel of organisation — Whether employer guilty of negligence — Damages — Assessment — Workmen's Compensation Ordinance, 1952, s. 19.

Damages — Injury in the course of employment — Employers' negligence — General and special damages — Pretrial loss of earnings — Loss of future earning capacity.

In this case the plaintiff was employed as a sawyer in the plaintiff's sawmill. He was injured in the course of his employment and as a result lost three fingers of his right hand. Because of the injuries he was refused further employment at the defendant's sawmill. He was out of work for one year until he found employment as a labourer. He sued the defendants and claimed general and special damages. The defendant denied liability contending that the plaintiff was not their employee but the employee of the defendant's contractor Lim. In the alternative the defendants pleaded that even if the plaintiff was held to be their employee, the defendants were not liable because the accident was wholly caused by the plaintiff's own negligence. The defendants also pleaded contributory negligence by the plaintiff.

Held: (1) the documentary evidence in this case constituted a clear admission by the defendants that the plaintiff was their employee and this admission despite the evidence given by the witnesses for the defendants remained unrebutted;

(2) on the facts of the case, Lim could not be held to be a contractor within the meaning of section 19 of the Workmen's Compensation Act, as he was not undertaking to execute any part of the defendant's sawmill business. He was merely a middle man or agent to procure workmen for the defendants to be employed at the defendant's sawmill. The employer of the workmen must be the defendant for whose business they were employed;